

No. 11918

United States
Circuit Court of Appeals
For the Ninth Circuit

HELMET P. LOYNING and JOHN ZWEIMER,
Respondents and Appellants,
vs.
B. P. LOYNING,
Petitioner and Appellee.

PETITION FOR REHEARING

FILED

JAN 25 1949

PAUL P. O'BRIEN,
CLERK

RALPH J. ANDERSON
Attorney for Appellee
and Petitioner

United States
Circuit Court of Appeals
For the Ninth Circuit

HELMET P. LOYNING and JOHN ZWEIMER,
Respondents and Appellants,

vs.

B. P. LOYNING,
Petitioner and Appellee.

PETITION FOR REHEARING

*To the United States Court of Appeals for the Ninth
Circuit, and the Judges Thereof:*

Comes now B. P. Loyning, the appellee in the above-entitled cause, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That the decision of the above-entitled Court is based upon a misapprehension of the law in that the Court states that there must be a violation of the "letter and spirit" of the Federal Court decree to constitute a contempt, whereas the law is that the violation of the spirit of an injunction,

even though its strict letter may not have been disregarded, is a breach of the mandate of the Court.

- Pfeiffenberger v. Illinois Terminal R. Co., (Ill.) 69 N. E. (2d) 355;
 Securities and Exchange Commission v. Okin, 2 Cir., 137 F. (2d) 862, and cases cited therein;
 John B. Stetson Co. v. Stephen L. Stetson Co., 2 Cir., 128 F. (2d) 981, and cases and authorities therein cited;
 Ginsberg v. Kentucky Utilities Co., (Ky.) 83 S. W. (2d) 497, and cases therein cited;
 State v. Freshwater, (W. V.) 148 S. E. 6, and authorities therein cited;
 Rapalje on Contempt, Section 40;
 43 C. J. S., Injunctions, Section 264 a, p. 1016, note 71.

II.

That the opinion of the Court disregards the well established rule that no scheme or subterfuge, however artfully designed to disguise its real nature and purpose, will be allowed to succeed if it constitutes in effect a substantial violation of the injunction.

- 43 C. J. S., Injunctions, Section 264 a, p. 1016, note 73;
 Southwestern Loan & Fin. Corp. v. Arkansas Transp. Co., (Ark.) 45 S. W. (2d) 501, and cases therein cited;
 Ginsberg v. Kentucky Utilities Co., (Ky.) 83 S. W. (2d) 497, and cases therein cited.

III.

That the Court is in error in holding that the fact that lawyers hold "entirely opposite views as to which decree controls" will excuse a contempt of the Federal Court decree. Advice of counsel is no defense to a proceeding for contempt. It may only be considered in mitigation of the offense.

17 C. J. S., Contempt, Section 38.

IV.

That the decision of the Court is contrary to the evidence. The Court recognizes that had the appellee diverted the water, which appellants refused to allow him to take under the Federal decree, the appellants might have "instituted contempt charges under the state decree." The action of the appellants in re-litigating the priority of these water rights in the state court and in asserting the priority of the state decree over the Federal decree and in refusing to allow appellee to divert water under the federal decree, constituted the subterfuge which violated the spirit of the Federal decree and placed appellants in contempt thereof. Appellants' action and conduct as effectively deprived appellee of the water to which he was entitled under the Federal decree as would have been the case had they dammed up his headgate or diverted all the water before it reached his headgate. By this scheme and subterfuge appellants effectively circumvented the Federal decree. The spirit of that decree has been violated, and under the authorities cited in paragraphs I and II above, appellants are in contempt. The Federal decree enjoined appellants

from "in any manner interfering with" appellee's prior rights, and appellants' actions violated that decree.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court of the United States in and for the District of Montana be upon further consideration affirmed.

Respectfully submitted,

RALPH J. ANDERSON
Attorney for Appellee

CERTIFICATE

I, Ralph J. Anderson, do hereby certify that I am the counsel for B. P. Loyning, the appellee in the above-entitled action, and that the foregoing petition for rehearing is not interposed for purposes of delay, but is presented in good faith and in my judgment is well founded and proper to be filed herein.

RALPH J. ANDERSON